

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

RICHARD BAYS,

Petitioner,

-vs-

WARDEN, Ohio State Penitentiary,

Respondent.

:

Case No. 3:08-cv-076

:

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

:

DECISION AND ORDER ON RECONSIDERATION OF MOTION TO PRECLUDE

This capital habeas corpus case is before the Court on Petitioner's Motion to Reconsider (Doc. No. 86) the Court's Decision and Order Denying Petitioner's Motion Preclude Dr. Barbra Bergman from testifying as a rebuttal expert witness in this case (Doc. No. 83). Petitioner presents good grounds for reconsideration in that the Warden's response did imply that Petitioner had had Dr. Bergman's report for several years and that she had testified in the state court proceedings. At this point whether Dr. Bergman testified in those proceedings is unclear to the Court and will be inquired into at the evidentiary hearing. Petitioner's counsel confirm that they have had Dr. Bergman's report, such as it is, since January 11, 2011.

Petitioner complains that Dr. Bergman's report does not comply with Fed. R. Civ. P. 26(a)(2)(B) and the Court agrees that is the case. However, there is no order of this Court applying Fed. R. Civ. P. 26(a)(2)(B) to this case or ordering the parties to provide expert reports. See Rule 12, Rules Governing § 2254 Cases.

Petitioner also asserts that he has the right to depose Dr. Bergman, relying on Fed. R. Civ. P. 26(b)(4)(A). The rights to discovery provided in the Federal Rules of Civil Procedure do not apply in cases brought under 28 U.S.C. § 2254. Instead, discovery in habeas corpus cases is discretionary with the Court and dependent on a showing of good cause. It is also subject to limitations on time for completing discovery adopted by the Court. In this case the discovery cut-off was November 9, 2009 (Doc. No. 41).

Accordingly, the evidentiary hearing will proceed on January 20, 2011, as previously ordered. Dr. Bergman will be permitted to testify and Petitioner's counsel will be expected to cross-examine her on the basis of the materials she has already furnished. If after that Petitioner's counsel desire to depose her further, they will be granted leave to do so, since the Warden's counsel has no objection.

January 18, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge